No. 81-6665

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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RAYMOND EDWARD JAMES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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Petitioner contends that the court of appeals erred in dismissing as untimely his appeal from the denial of a motion to reduce his sentence. He seeks as relief either this Court's plenary consideration of his underlying claim on appeal (which the court of appeals did not reach) or vacation of the court of appeals' dismissal of his appeal and remand to that court for disposition by it on the merits. We do not oppose vacation of the judgment of dismissal and remand to the court of appeals.

1. Following a jury trial in the United States District Court for the District of Oregon, petitioner was convicted of armed bank robbery, in violation of 18 U.S.C. 2113(d). He was sentenced to a 20-year term of imprisonment, to run consecutively to a sentence he was serving on an unrelated offense. The court of appeals affirmed in an unpublished memorandum order, United States v. James, 614 F.2d 777 (9th Cir. 1980), and this Court denied a petition for a writ of certiorari on October 6, 1980 (449 U.S. 846).

On January 19, 1981, petitioner filed a motion for reduction of sentence pursuant to Fed. R. Crim. P. 35. The district court denied the motion on July 7, 1981 (Pet. App. D). Petitioner, however, alleges that he did not receive notice of the district court's action until September 1981. At that time, he requested leave of the district court to file an out-of-time appeal from the denial of his motion for reduction of sentence. On December 9, 1981, the district court granted petitioner leave to appeal out-of-time (App. A, infra), and a notice of appeal was filed on petitioner's behalf on December 10, 1981 (Pet. App. B).[1/]

The court of appeals dismissed petitioner's appeal for lack of jurisdiction because of its untimeliness (Pet. App. A).[2/] On April 13, 1982, petitioner addressed a letter to Circuit Judge Wright, which petitioner requested be construed as a motion to reopen the appeal from the denial of his Rule 35 motion (App. B, infra). The court of appeals, construing the letter according to petitioner's request, denied reconsideration on the same jurisdictional ground (App. C, infra).

1/ The clerk of the district court has explained that the "long standing" procedure followed by the employees in his office is to place the notation "ntfd" next to the file stamp on the original order once notice of the entry of the order or copies of the order itself have been sent to the parties to the case (Pet. App. D). The handwritten "ntfd" symbol does appear on the copy of the original order at issue in this case (ibid.). The clerk further stated that the deputy clerk who made the notation in this case had been employed in his office for more than ten years and that she had followed the notification procedure "on countless occasions." Although she had "no independent recollection of the actual mailing of the copies in this instance," she recollected nothing "that would have caused deviation from the usual practice." Ibid.

The records of the United States Attorney's Office do not, however, indicate that that office received notice or a copy of the order denying petitioner's motion for reduction of sentence at or around the time it was entered. On appeal, the government did not contest the district court's apparent finding that petitioner had not received notice of the denial of his Rule 35 motion (Pet. App. C). Nor did it seek dismissal of petitioner's appeal as untimely. The court of appeals dismissed the appeal for lack of jurisdiction sua sponte.

2/ Petitioner's appeal from the denial of his Rule 35 motion had been consolidated with an appeal from the denial of another motion by him seeking the return of allegedly illegally seized property, pursuant to Fed. R. Crim. P. 41(e). The latter appeal is still pending.

2. Fed. R. App. P. 4(b) provides that a notice of appeal by a defendant in a criminal case must be filed within 10 days after entry of the judgment or order of which review is sought.3/ Rule 4(b) further provides a 30-day extension of time for filing a notice of appeal in a criminal case "[u]pon a showing of excusable neglect." It is settled, however, that the 30-day "grace period" permitted by Rule 4(b) may not be extended. United States v. June, 503 F.2d 442, 443-444 (8th Cir. 1974); United States v. Hoye, 548 F.2d 1271, 1273 (6th Cir. 1977). Accordingly, petitioner's notice of appeal, filed 156 days after the denial of his motion to reduce sentence, failed to confer jurisdiction over his appeal.4/

We recognize that dismissal of an appeal is an extremely harsh result where the reason for the untimeliness of the notice of appeal was the failure of the appellant to receive timely notice of the action of the district court of which he seeks review.5/ Nevertheless, in view of this Court's holdings to the effect that the filing of a notice of appeal within the prescribed time is "mandatory and jurisdictional," it is not clear to us that any other option was available to the court of appeals. United States v. Robinson, 361 U.S. 220, 224, 229 (1960). See also Temple v. United States, 386 U.S. 961 (1967)

3/ The court of appeals erred in treating petitioner's motion to reduce sentence pursuant to Fed. R. Crim. P. 35 as a civil proceeding governed by Fed. R. App. P. 4(a). See Heflin v. United States, 358 U.S. 415, 418 n.7 (1959); United States v. Bedrosian, 631 F.2d 583 (8th Cir. 1980); United States v. Guiterrez, 556 F.2d 1217 (5th Cir. 1977); McCartney v. United States, 382 F.2d 116, 118 (9th Cir. 1967); Klink v. United States, 308 F.2d 775, 776 (10th Cir. 1962).

4/ Even if petitioner's motion for leave to file an out-of-time appeal were construed as a notice of appeal it would be inadequate, since neither it nor the actual notice of appeal was filed within 40 days after the district court's denial of petitioner's motion for reduction of sentence, as required by Fed. R. App. P. 4(b).

5/ We note, however, that such a result could be avoided by the prospective appellant's checking the docket sheets or (in the case of an incarcerated defendant) inquiring of the district court clerk's office approximately every 30 days.

(denial of petition for writ of certiorari); Berman v. United States, 378 U.S. 530 (1964) (per curiam). With respect to the specific facts of the present case, that conclusion is bolstered by Fed. R. Crim. P. 49(c), which expressly provides that "[l]ack of notice of the entry [of an order made on a written motion subsequent to arraignment] by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted by Rule 4(b) of the Federal Rules of Appellate Procedure." Cf. Weldon v. Gaden, 419 F.2d 303, 307-308 (D.C. Cir. 1969).6/

3. However, one commentator has suggested that "it is theoretically possible that in a case in which no notice was sent and 40 days elapsed after entry of the order the Supreme Court might hold that despite [Fed. R. Crim. P. 49(c)], entry of the judgment for purposes of appeal was incomplete without notice" (9 Moore's Federal Practice, ¶204.04 at 4-20 (footnote omitted)).

Alternatively, this Court has held that in certain "unique circumstances" (Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215, 217 (1962)) an appellate tribunal may hear an appeal that was not filed within the prescribed time limits. See id. at 4-16 to 4-18. In Fallen v. United States, 378 U.S. 139 (1964), the Court held that a notice of appeal mailed by an incarcerated defendant eight days after sentencing, which "in the normal course of events [would] have been received by the clerk within the [required] 10 days" (id. at 143), but which in fact was not received in the clerk's office until 14 days after

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6/ In denying petitioner's motion for reconsideration, the court below indicated that petitioner could file another Rule 35 motion and, if it were denied, take a timely appeal therefrom (App. C, infra). The court of appeals' suggestion is without legal foundation, however, since Rule 35 does not permit consideration of successive motions filed outside the 120-day period. See United States v. Hetrick, 644 F.2d at 752, 756 (9th Cir. 1981).

sentencing, would be considered timely.7/ Noting (ibid.), inter alia, that mail pickups at the prison in which the appellant was incarcerated occurred only twice a week, this Court concluded (id. at 144) that the appellant "had done all that could reasonably be expected to get the letter to its destination within the required 10 days." Accordingly, the Court "decline[d] to read the Rules so rigidly as to bar a determination of his appeal on the merits" (ibid.).

Similarly, the appellant in Thompson v. INS, 375 U.S. 384 (1964), an alien seeking naturalization, filed motions for a new trial and to amend certain findings of fact 12 days after entry of the final order denying his petition for naturalization. At that time, the district court erroneously assured the appellant specifically that his motions were made "'in ample time'" (id. at 385). The motions were denied five and one-half months later. The appellant's notice of appeal was filed within 60 days of the denial of his post-trial motions, but not within 60 or even 90 days after the original entry of judgment.8/ The court of appeals granted the government's motion to dismiss the appeal on the grounds that the notice of appeal had not been filed within the prescribed 60-day period and that because the appellant's post-judgment motions had not been timely they did not toll the running of the time for appeal. Noting (id. at 387) that the appellant had "relied on the statement of the district court and filed the appeal within the assumedly new deadline but beyond the old deadline," this Court vacated the judgment of the court of appeals and remanded the case to it for dispositon on the merits.

7/ Pallen was decided prior to the 1966 amendment to Fed. R. Crim. P. 4(b) that, for the first time, permitted the district courts to extend the time for filing a notice of appeal in a criminal case for an additional 30 days "[u]pon a showing of excusable neglect."

8/ Fed. R. Civ. P. 73(a) then permitted a district court to extend the time for taking an appeal for an additional 30 days "upon a showing of excusable neglect."

Fallen and Thompson, read together, may be explained as standing for the principle that where a litigant could, and presumably would, have taken a timely appeal, but did not do so because of a misrepresentation or other misleading action by the government, his appeal nevertheless will be deemed timely.9/ This analysis would be applicable to the present case as well, since the district court apparently concluded that the clerk's failure to notify petitioner of the denial of his Rule 35 motion resulted in his mistaken belief that no notice of appeal was yet required. Indeed, this Court held in Rosenbloom v. United States, 355 U.S. 80 (1957), that where the government had conceded that the clerk of the district court had failed to notify the appellant of the denial of his timely motion for a new trial and where proceedings held in open court could have been construed as an (albeit unfounded)10/ extension of the time in which an appeal could be taken, the court of appeals erred in dismissing as untimely an appeal filed more than 10 days after entry of denial of the motion.

Fed. R. Crim. P. 49(c), however, which, as noted above (page 4, supra), provides that the failure of the clerk to notify a litigant of the entry of the denial of a motion does not affect the time in which he may appeal therefrom (except as provided for

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9/ Although Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., supra, also has been explained on that ground (9 Moore's, supra, ¶204.04 at 4-16 n.17), it is not necessary to go so far to account for the result reached there. In that case, the court of appeals had dismissed the appeal, which had been filed within an extension of time granted by the district court for "excusable neglect based on a failure of a party to learn of the entry of judgment" pursuant to then Fed. R. Civ. P. 73(a), as untimely on the ground that the district court had erred in finding excusable neglect and, hence, in granting the extension. This Court vacated the judgment of dismissal holding that "great deference" should be accorded by a reviewing court to a lower court's grant of an extension in which to take an appeal "[i]n view of the obvious great hardship to a party who relies upon the trial judge's finding of 'excusable neglect' prior to the expiration of the 30-day period [within which an appeal in a civil case could be taken as a matter of right] and then suffers reversal of the finding" (371 U.S. at 217). Harris Truck Lines is distinguishable from the present case (as well as from Fallen and Thompson, supra) because there the notice of appeal at least was filed within the extended time period permitted by the Rules.

10/ See note 7, supra.

in Fed. R. App. 4(b)), was adopted subsequent to this Court's decisions in Rosenbloom, Fallen and Thompson. Indeed, the Advisory Committee's notes on Rule 49(c) specifically mention Rosenbloom. Notwithstanding the obvious possibility that the failure to notify could continue for more than 40 days, the commmittee concluded that "[t]he excusable neglect extension provision in [Fed. R. App. P. 4(b)] will cover most cases where failure of the clerk to give notice of judgments or orders has misled the defendant. No need appears for an indefinite extension without time limit beyond the 30 day period."11/

Accordingly, it remains unclear to us that there was any legal basis available to the court of appeals on which to do anything but dismiss petitioner's appeal. Nevertheless, in view of the "unique circumstances" of this case, we do not oppose the granting of the petition for the purpose of vacating the dismissal of the appeal and remanding the case to the court of appeals for disposition on the merits, as petitioner has requested (Pet. 8).12/

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated and the case remanded to that court for disposition on the merits, or the petition should be denied.

REX E. LEE
Solicitor General

JULY 1982

11/ Similarly, when the district courts first were permitted to extend the time for taking an appeal in a civil case "upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment in the district court" (Fed. R. Civ. P. 73(a) (1946)) the extension permitted was limited to 30 days. See Advisory Committee's notes to Fed. R. Civ. P. 73(a).

12/ We submit, however, that the petition should not be granted for the purpose of affording plenary consideration of petitioner's Rule 35 issues, including his underlying claim that his Rule 35 motion should have been disposed of by the court that sentenced him, since those issues have not been passed on by the court of appeals.